Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH H. CLARK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 6TH CIRCUIT

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Clark
717 Penobscot Building
Detroit, MI 48226
(313) 965-4189

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QUESTIONS PRESENTED

Petitioner Kenneth H. Clark, Sr. was convicted in the United States District Court for the Eastern District of Michigan of 2 counts of mail fraud, 18 U.S.C. § 1341, and 2 counts of health care fraud, 18 U.S.C. § 1347. The convictions and sentences were affirmed by the Sixth Circuit Court of Appeals December 14, 2001. The questions presented are:

QUESTION 1: WHETHER DEFENDANT, ON TRIAL FOR MAIL FRAUD AND HEALTH CARE FRAUD, WAS DENIED A FAIR TRIAL BY TESTIMONY THAT MORE THAN A DECADE EARLIER HE WAS DISCIPLINED AS A POLICE OFFICER FOR VIOLATING A RULE ABOUT OUTSIDE EMPLOYMENT.

QUESTION 2: WHETHER DEFENDANT WAS DENIED A FAIR TRIAL BY THE ADMISSION OF ADDITIONAL PREJUDICIAL BAD ACTS.

QUESTION 3: WHETHER THE RULE THAT LIMITS BAD CHARACTER EVIDENCE TO REBUTTING THE SPECIFIC CHARACTER TRAIT PRESENTED BY DEFENSE EVIDENCE, CAN BE EVADED BY THE CREATION OF A NEW RULE OF "GENERAL CHARACTER EVIDENCE" THAT AVOIDS THOSE LIMITS.

QUESTION 4: WHETHER DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S

KNOWING AND INTENTIONAL USE OF FALSE AND MISLEADING ARGUMENT.

QUESTION 5: WHETHER DEFENDANT WAS DENIED A FAIR TRIAL BY THE COURT'S REFUSAL TO GRANT A REASONABLE REQUEST FOR ADJOURNMENT.

QUESTION 6: WHETHER DEFENDANT WAS DENIED VARIOUS RIGHTS BY THE REFUSAL OF THE TRIAL COURT TO ALLOW HIM TO FIRE ATTORNEY MULLKOFF.

QUESTION 7: WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION ON COUNTS 3 AND 4.

QUESTION 8: WHETHER THE COURT IMPROPERLY SENTENCED DEFENDANT ON THE BASIS OF INCORRECTLY CALCULATED SENTENCING GUIDELINES.

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KENNETH H. CLARK, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the 6th Circuit Court of Appeals issued December 14, 2001, upholding his convictions in the United States District Court for the Eastern District of Michigan, with judgment being entered June 22, 2000.

OPINION BELOW

The following opinion below is attached in the Appendix: Sixth Circuit opinion affirming convictions and sentences, dated December 14, 2001.

STATEMENT OF JURISDICTION.

This case began as a federal criminal prosecution in the United States District Court for the Eastern District of Michigan. The original criminal judgment was entered June 22, 2000. The ruling of the Sixth Circuit Court of Appeals was issued December 14, 2001. This Court has jurisdiction under 28 U.S.C. §1254 to review the final judgment of the United States Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for

the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Defendant-Appellant Kenneth H. Clark, Sr. was convicted of 2 counts of mail fraud, 18 U.S.C. § 1341, and 2 counts of health care fraud, 18 U.S.C. § 1347. The indictment charges that the events took place from April 1996 to March 1998. On June 22, 2000, Judge Nancy Edmunds of the United States District Court, Eastern District of Michigan, sentenced

Defendant to prison for 30 months, and ordered restitution of $324,413.55. Motion for New Trial was denied June 21, 2000. The Sixth Circuit Court of Appeals affirmed December 14, 2001.

FACTS CONCERNING THE TRIAL

Defendant ran the W.G. Clark Counseling Center in Detroit, Michigan. Mentally disabled witnesses Alice Humphries, Ruby Brown, David Meadows, Greg Monk, Celeste Jones, Titus Walters and Donald McQueen testified that they either did not visit the Clark center at all, or that they only visited a few times. (T Aug 31, 30, 40, 47, 49, 51, 59, 61, 74, 76, 82, 84; T Sept 1, 71-74, 83-84)

Several of these witnesses indicated that they received referrals to or from the Lifeline program, a substance abuse treatment center located in Chicago, that got clients from Detroit. The contacts were at Herman Kiefer Hospital, and involved Lifeline employee Ron Hawkins. (T Aug 31, 37, 50, 54, 61, 76-77, 84; T Sept 1, 78).

Zita Owens, a Medicaid investigator, testified that Defendant, a licensed Social Worker (T Sept 1, 38), had gotten a Provider Information Number from Medicaid for the W.G. Clark Counseling Center. (T Sept 1, 7). She testified that the electronic billings for the W.G. Clark Center showed more counseling sessions with the individuals than the individuals testified happened. She also testified that, in the records provided her by the Government, she found inadequate documentation to support several of the bills submitted. (T Sept 1, 19-20).

Dr. James Beale testified that he was asked by Defendant to accept referrals to do drug screenings, and he agreed. (T Sept 1, 46). He conceded that he did have about 15 to 20 such referrals. (T Sept 1, 52). He delegated all his billings to his office manager Mary Pryor. (T Sept 1, 56).

Valerie Sanford, Defendant's sister, testified that she was a licensed psychiatric social worker. Defendant wanted to use her certification regarding a counseling business he was operating, and she sent it to him. She also testified that her purported signature on certain forms was not signed by her. (T Sept 1, 59-62).

Lori Rogers worked in Defendant's office, and testified that he did see counseling clients there. (T Sept 1, 94). She did not handle the billing. The office referred counseling clients to Dr. Fowler for blood tests. She never saw Defendant operating a computer. (T Sept 1,94-98).

Ron Hawkins testified that he met with Defendant and agreed to refer clients to him for follow-up counseling after completion of the Lifeline program. He denied all wrongdoing. (T Sept 1, 108-128).

Danyale Ricard and Cassandra Woodard testified they worked for Defendant. Defendant would see clients there. Defendant did not have internet access to make electronic billings. Ron Hawkins would frequently call and visit Defendant at the office. (T Sept 2, 32, 34, 37, 43, 45).

Michele Jakubiec of Blue Cross Blue Shield (BCBS) testified that Defendant submitted billings

to them of $19,124.03 for patients, and $15,540.71 for the Clark Center. (T Sept 2, 54). Dr. Guston Lo of BCBS testified that from records provided him by the Government, he could not find adequate documentation for treatment that Defendant billed for. (T Sept 2, 81-101).

Dr. Carl Fowler testified that he was informed by his office manager that he would receive referrals for blood tests from the Clark Center. (T Sept 9, 6). He did not remember any referrals from the Clark Center, but later admitted that there were 5. (T Sept 9, 14-16). He stated that his purported signature on a form was not signed by him. (T Sept 9, 7).

FBI Agent Elena Wozniak testified that a search warrant at Defendant's office on April 1, 1998 resulted in seizure of records that were provided to the government witnesses. (T Sept 9, 19). Defendant told her that while he was responsible for billings made by the W.G. Clark Counseling Center, he had been tricked. (T Sept 9, 27).

Mary Pryor testified to being the office manager for Dr. Beale. She testified she did not remember having any contact with anyone about the Clark Center. She conceded that she told Agent Wozniak that at the instructions of Dr. Beale, she faxed to Defendant information on Dr. Beale's licensing for Mr. Clark to put on the application forms. (T Sept 9, 82, 86).

Defendant Kenneth Clark testified that he was a police officer from 1973 to 1986. In 1975 he got a Master's Degree in Counseling from University of Michigan. In 1979, he started a private polygraph

business. After a new law cut down on employer polygraphs, he went into the pest control business, and the security guard business. (T Sept 10, 11-16). However, the security guard business went out of business because a contract was cancelled because he refused to pay a bribe. (T Sept 10, 17).

Mr. Clark found that billings for counseling services were very confusing. Ron Hawkins offered to do his billings for him. Defendant gave Hawkins his records about many patients, explaining why those records were not found in his office during the search. Mr. Hawkins advised Defendant to switch to electronic billing, and Defendant signed the forms for that provided him by Mr. Hawkins. (T Sept 10, 26-28). Mr. Clark did have computers, but they were all old, and did not have the internet access needed for electronic billing. (T Sept 10, 29).

Mr. Hawkins told Defendant that he would do his own billings as he did the billings for Mr. Clark, and that Mr. Clark could just reimburse him for the billings that did not reflect services performed by Clark. He paid Mr. Hawkins thousands of dollars in cash over 2 years. (T Sept 10, 29-31). When he received complaints from people that there were billings for services he did not render, he referred them to his biller, Ron Hawkins, and Hawkins promised to correct whatever problem there was. (T Sept 10, 32). Defendant testified that some of the billings testified to by the witnesses were for people he never heard of, and the only way that their information, including Medicaid number, could

have gotten on any of his billings was that Ron Hawkins put them there. (T Sept 10, 35).

Over objection, the prosecutor brought out that Defendant frequently ate at the high-priced Excalibur restaurant, and that in 1985 Mr. Clark had been disciplined by the police department for violating an order to stop conducting private polygraph exams. (T Sept 10, 45, 51-55).

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER DEFENDANT, ON TRIAL FOR MAIL FRAUD AND HEALTH CARE FRAUD, WAS DENIED A FAIR TRIAL BY TESTIMONY THAT MORE THAN A DECADE EARLIER HE WAS DISCIPLINED AS A POLICE OFFICER FOR VIOLATING A RULE ABOUT OUTSIDE EMPLOYMENT.

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The extent to which it is lawful to present unrelated bad acts of the Defendant at his trial on federal felony charges is an issue which in the past has been considered important enough to merit United States Supreme Court review. See, for example, *Old Chief v. United States*, 519 U.S. 172; 117 S.Ct. 644; 136 L.Ed.2d 574 (1997); *Huddleston v. United States*, 485 U.S. 681; 108 S.Ct. 1496; 99 L.Ed.2d 771 (1988); *Michelson v. United States*, 335 U.S. 469; 69 S.Ct. 213; 93 L.Ed. 168 (1948); etc.

Because of the nature of federal criminal jurisdiction, there is no state Supreme Court involved to set policy regarding evidentiary matters. Therefore, the United States Supreme Court should properly have an expanded role in federal criminal cases as opposed to state criminal cases.

The clear record in this case, coupled with the remoteness in time of some of the bad acts, makes this case uniquely suitable for Supreme Court review. The incorrect and unfair ruling of the Sixth Circuit Court of Appeals on these questions, involving the creation of a new rule of "general character evidence," also makes this case uniquely suitable for Supreme Court review.

The evidence in question here is (1) testimony that Defendant, while employed as a police officer years ago, was ordered to stop his outside business of polygraph consulting, but failed to do so, resulting in his being disciplined by the Detroit Police Department; and (2) testimony that Defendant liked to eat at an expensive restaurant, The Excalibur.

There is little question that this testimony was prejudicial, and the real question is whether it was admissible.

Mr. Clark testified at the trial, which took place in September 1999. He outlined his educational background. He also mentioned that he was a Detroit police officer from April 1973 to December 1986. (T Sept 10, 12-13). At no time did he testify that his employment with the police department was free of controversy or free of disciplinary actions against him. At no time did he testify that while an officer he never violated any instructions of his superiors.

Mr. Clark also testified that he started a private polygraph business in 1979 while a police officer. (T Sept 10, 14-15).

There was no allegation by the prosecutor that any of this background testimony was false.

The prosecutor then decided to bring out the fact that while Mr. Clark was a police officer, in 1985, he was ordered by the Chief of Police not to conduct more polygraphs, and that he had a disciplinary hearing for disobeying that order. The defense raised an objection based on relevance. The prosecutor claimed that the testimony was admissible because related to credibility. The judge permitted the testimony. (T Sept 10, 51-56).

The judge's ruling was as follows (T Sept 10, 52):

> THE COURT: I'm going to permit this Rule 404(a)(1), the evidence of pertinent traits

> of character of an accused, offered by an accused or by the prosecution to rebut the same. I'll let you put in all that."

The judge also stated; "This goes directly to his direct testimony. It goes to his character and I'm going to permit it." (Opinion, 6; Apx. A6-A7).

The trial court based its ruling on F.R.E. 404(a)(1). The rule of evidence does not permit the prosecution to admit testimony about a defendant's character. The prosecutor raised only credibility as his basis for admission, and did not claim it was admissible as "proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident." Therefore there could not be admissibility under F.R.E. 404(b).

The prosecutor then went on to introduce the evidence before the jury. (T Sept 10, 55-56).

The Sixth Circuit Court of Appeals conceded that the evidence did not directly rebut defense testimony that allegedly bolstered Defendant Clark's reputation for honesty, but ruled that (Opinion, 6; Apx. A7):

> "If viewed as general character evidence introduced to rebut Clark's extensive testimony about his police career and the polygraph business which grew out of his specialized police training, the cross-examination was permissible in that it spoke directly to the general good

> character evidence set out by the defendant."

Before this case, the rule in the Sixth Circuit was that if the defense presents character testimony, the prosecution can cross-examine defense witnesses about specific instances of conduct, however, "the incidents inquired about must be relevant to the character traits at issue in the case." *United States v. Monteleone*, 77 F.3d 1086 (8th Cir. 1996).

Where a prior bad act may show bad character, but does not specifically show an act of lying, the prior bad act cannot be used to show lack of credibility. *United States v. Talley*, 164 F.3d 989 (6th Cir. 1999). See also *United States v. Birns*, 395 F.2d 943 (6th Cir. 1968) [prior conviction for tax evasion had no logical tendency to prove that defendant had committed perjury.]

The new concept of "general character evidence" makes limitations on prosecution character evidence a nullity. The main feature of the new rule of law is that if a defendant mentions any fact about his past, the prosecutor can delve into the circumstances of that past fact to try to show anything that tends to put the accused in a bad light, because that is purportedly needed to show the "complete picture." (Opinion, 7; Apx. A8). This eliminates the rule discussed by the Supreme Court in *Michelson v. United States*, 335 U.S. 469; 69 S.Ct. 213; 93 L.Ed. 168 (1948), that:

> 'The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'"

Even if established by evidence, fundamental fairness prohibits "the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity or knowledge." *Huddleston v. United States*, 485 U.S. 681, 685; 108 S.Ct. 1496; 99 L.Ed.2d 771 (1988).

As the Court held in *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir. 1989):

> "evidence of criminal character or propensity is excluded because the jury might convict the defendant for the conduct proving propensity rather than for the offense for which he is on trial."

Defendant dared to testify he had been a police officer. The Sixth Circuit says that gives the prosecution full rein to inquire into his acts as a police officer. It does not matter if they deal with honesty or not; as long as they make the Defendant look bad, they can be admitted to show the "complete picture." (Opinion, 7; Apx. A8).

If this rule is not overturned, it will create great mischief in the courts. Consider these examples:

1. A Defendant testifies he is a doctor. The prosecution can introduce evidence of how he ran his practice, and any complaints about him, to rebut the alleged suggestion that the Defendant, because a doctor, is of good "general character."
2. A Defendant testifies he was a judge. The prosecution is entitled to bring out testimony about his past rulings, about reversals issued against him, or grievances filed against him, to show the "complete picture" of his judicial career.
3. A Defendant testifies that he graduated from college. The prosecution is entitled to bring out testimony about his actions in college, and any discipline he received in college, to show the "complete picture" of the Defendant's college career. If he cheated on a test, or got drunk, or skipped classes, that evidence is needed to avoid the suggestion that the Defendant, because he was a college student, was of "general good character."
4. A Defendant testifies that he is married, or was once married. The prosecution is entitled to bring out any instances of domestic violence, or affairs, to

show the "complete picture" of the marriage.

We submit that the proper rule is just as it has always been before this case, that is, that bad character evidence is limited to that which rebuts good character evidence presented by the defense. To present true biographical information about his own life is not to present character evidence at all, *United States v. Hughes*, 895 F.2d 1195 (6th Cir. 1990); *State of Arizona v. Elmer*, 21 F.3d 331 (9th Cir. 1994), and presents nothing to rebut.

This was not proper rebuttal, because it did not contradict any of the defense testimony in the case.

Here, as in *United States v. Dunn*, 805 F.2d 1275 (6th Cir. 1986), the real purpose was to suggest that Defendant has a character for committing misconduct. In *Dunn*, the defendant was on trial for arson, and the prosecutor put forth evidence that defendant had a contract cancelled for stealing eggs. The error here was worse than in *Dunn*, because unlike in *Dunn* the "impeaching" evidence here did not actually deal with honesty

Here, the 14 year old prior act of disobeying his employer's instructions to cease his private business was far more prejudicial than probative, F.R.E. 403, because it does not tend to establish that Defendant Clark has told lies under oath, or that he has told lies at all, or that he committed the offense in question, while at the same time it does tend to show the jury that he had unrelated misbehavior before and therefore is more likely to have committed misbehavior on this occasion.

The Court in *United States v. McFadyen-Snider*, 552 F.2d 1178 (6th Cir. 1977), held that the defendant's prior bad acts relating to giving bad checks was inadmissible to show involvement in the charged mail fraud scheme. It is hard to imagine evidence more collateral to a mail fraud charge than evidence that Defendant, at a former job, disobeyed an employer's instruction to stop his outside work, and was disciplined for it.

Remoteness in time was held to reduce probative value, and hence make evidence of other acts inadmissible, in *United States v. Myers*, 123 F.3d 350 (6th Cir. 1997) and *United States v. Brown*, 147 F.3d 477 (6th Cir. 1998). Even if this had been a conviction, it could not have been used because of its age. F.R.E. 609. It is hard to see how the prosecutor gets a greater right to admit very old conduct by the mere fact that there was no conviction.

The bad act testimony was unduly prejudicial. The implication was that if Defendant would break a rule once, he would break the rules he was accused of breaking in this case. Certainly, there was no striking similarity between working a second job in violation of employer's instructions, and filing fraudulent billing claims to Medicare and an insurance company. Further, the jurors plainly understood they were to use this testimony to determine Defendant's guilt, or it would not have been admitted.

The fact that the events happened 14 years before trial, and that the judge gave no limiting

instructions, are further evidence that the testimony was more prejudicial than probative. Remoteness in time was held to reduce probative value, and hence make evidence of other acts inadmissible, in *United States v. Myers*, supra.

Testimony of other crimes or other bad acts, when not relevant, is usually considered to be of great prejudicial effect, sufficient to justify reversal. See *United States v. Lachman*, 48 F.3d 586 (1st Cir. 1995): "The concern is with any pronounced tendency of evidence to lead the jury, often for emotional reasons, to desire to convict a defendant for reasons other than the defendant's guilt."

As the Court held in *Old Chief v. United States*, 519 U.S. 172; 117 S.Ct. 644; 136 L.Ed.2d 574 (1997):

> "'Unfair prejudice' ... means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. ...
>
> Such improper grounds certainly include the one that Old Chief points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged."

It was highly prejudicial to place before the jury information about unrelated and old misdeeds of Defendant, which could cause the jury to abandon the presumption of innocence, *Taylor v. Kentucky*, 436 U.S. 478; 98 S.Ct. 1930; 56 L.Ed.2d 468 (1978),

and find Defendant guilty of fraud based on his past bad acts.

The same is true of Defendant's admitted habit of eating at expensive restaurants. None of the questioning about Defendant dining at the Excalibur restaurant had any bearing on whether he submitted false billings to Medicaid or to Blue Cross Blue Shield. The subject of billings was not discussed at all in the Excalibur questioning.

Similarly, there was no claim that Defendant billed Medicaid or BCBS for dining at the Excalibur. Accordingly, the testimony about Defendant's dining habits had no tendency to show that any statement in a billing to Medicaid or BCBS was false or fraudulent.

This questioning was certainly not to rebut any part of the Defendant's testimony. Defendant never testified on direct that he did not go to the Excalibur restaurant, or that he did not eat expensive meals.

The questioning and answers were essentially that Defendant went to this fancy restaurant a lot, and that a meal for 2 would cost $106. The only possible purpose of the questioning was to engender resentment in the members of the jury against this man who went to fancier, more expensive restaurants on a regular basis than they did.

Until this case, the rule in the Sixth Circuit was that the prosecution has no right to introduce bad character evidence to "rebut" testimony that the defense did not give. *United States v. Roper*, 135 F.3d 430 (6th Cir. 1998).

This demonstrates the evil associated with the new rule of "general character evidence." If the Defendant presents any fact that might put him in a good light, under this rule the prosecution can present any fact that might put him in a bad light, no matter how remote in time, and no matter how remote from contradicting the actual defense testimony.

The Sixth Circuit ruling that the testimony "could not have been significantly prejudicial to Clark" (Opinion, 7; Apx. A8) ignores the fact that Defendant Clark gave testimony which, if believed, would show him completely innocent of these charges. "General character evidence" against him made it far less likely that his testimony would be believed. The fact that the Sixth Circuit panel evidently did not believe his testimony is not a substitute for a fair determination by a jury based on a fair trial record. See *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

This Court should therefore grant certiorari, and reverse for a new trial at which Defendant's violation of employer rules 14 years before trial shall not be admitted, unless the Defendant first introduces evidence that he would never violate a rule imposed by an employer. This Court should reverse for a new trial at which Defendant's actions in eating at an expensive restaurant shall not be admitted, unless the Defendant first testifies on direct examination that he would never eat at such a restaurant.

QUESTION 4: WHETHER DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S KNOWING AND INTENTIONAL USE OF FALSE AND MISLEADING ARGUMENT.

The question of whether a prosecutor is permitted to knowingly deceive the jury is one of enormous import to the criminal justice system of the United States. To find no misconduct here, as the Sixth Circuit panel did, was highly unreasonable and led to a manifestly unjust result.

At a grand jury proceeding on November 10, 1998, trial prosecutor F. William Soisson was the prosecutor. FBI Agent Elena Wozniak was the only witness. Prosecutor Soisson asked her questions about withdrawals from Defendant's bank account (T GJ, Nov 10, 18):

"Q And what bank account was that?

A This is Standard Federal bank account. And I don't have with me the exact number on the account.

Q But that was a W.G. Clark Counseling Service account?

A Yes.

Q Does that show – the deposit records show deposits of both the

Medicare checks and the Blue Cross checks to that account?

A Yes, they do.

Q And does it show withdrawal of funds from that account?

A Yes.

Q Were many of them significantly large cash withdrawals?

A Yes."

At trial, Defendant testified that Ron Hawkins did his billing, and that Hawkins did his own billings. Defendant testified he made payments to Ron Hawkins in cash, that covered billings that were not for Defendant's own activities. (T Sept 10, 30-31). The defense was that Hawkins committed the frauds, not Defendant.

The prosecutor legitimately questioned Defendant about the cash payments, casting doubt on whether Defendant made them. (T Sept 10, 39-40).

What was illegitimate was the prosecutor's comments in closing argument (T Sept 10, 68):

"And if you look at the bank records or whatever accounts you want to look at,

> you're not going to see large cash withdrawals to make these payments."

We submit that where the prosecutor at the grand jury specifically asked his witness about large cash withdrawals, and knew that there were such withdrawals, it was improper for that same prosecutor at trial to argue the opposite to the jury.

In *Napue v. Illinois*, 360 U.S. 264; 79 S.Ct. 1173; 3 L.Ed.2d 1217 (1959), the Court held that "a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction."

The "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153; 92 S.Ct. 763; 31 L.Ed.2d 104 (1972). Further, as the Court made clear in *Armour v. Salisbury*, 492 F.2d 1032 (6th Cir. 1974), it makes no difference if it is witness testimony or prosecutor argument that is false:

> "But the basic tenet of *Giglio* does not depend on whether misleading information was given to the jury in the form of a closing argument by a prosecutor rather than through the testimony of a witness."

In *Scott v. Foltz*, 612 F. Supp. 50 (ED Mich., 1985), the court granted habeas corpus relief where there was an undisclosed deal with witness Murry.

The Court found that the prosecutor's questions created the impression of no deal, and that such misleading is constitutionally intolerable even if technically no perjury was committed. In accord, finding unconstitutional conduct by a prosecutor where he misled the jury, see *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975) [it was improper for prosecutor to elicit truthful testimony that stains looked to the witness to be bloodstains, when the prosecutor knew it was not blood]. As the Court held in *Hilliard*:

> "The function of a criminal trial is to discover the truth, and to that end it is the prosecutor's duty to reveal pertinent information, not to hide it. *Brady v. Maryland*, supra, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)."

There can be no doubt that the comments were deliberately placed before the jury. This was not an off-hand comment in the midst of a discussion between attorneys. Rather, this was part of the planned closing argument. Mr. Soisson personally knew what the evidence was, and deliberately chose to mislead the jury about it. This Court should grant a new trial at which the prosecutor does not mislead the jury by giving argument he knows to be false.

QUESTION 5: WHETHER DEFENDANT WAS

DENIED A FAIR TRIAL BY THE COURT'S REFUSAL TO GRANT A REASONABLE REQUEST FOR ADJOURNMENT.

QUESTION 6: WHETHER DEFENDANT WAS DENIED VARIOUS RIGHTS BY THE REFUSAL OF THE TRIAL COURT TO ALLOW HIM TO FIRE ATTORNEY MULLKOFF.

On August 31, 1999, the trial court denied a motion by defense counsel Douglas Mullkoff to adjourn the trial. (T Aug 31, 4, 13-14). Although Mr. Mullkoff had been on the case for 70 to 80 days, he had tried to get a list of witnesses from the prosecution, without success. On "Thursday of the last week" (August 26), defense counsel was finally provided with a list of names and FBI 302 witness interview reports. Counsel discovered that several of the witnesses were adjudged by the Social Security Administration to be suffering from mental disabilities. Counsel complained that "I believe that their ability to testify as competent witnesses may be affected by their mental health status." (T Aug 31, 6).

Mr. Mullkoff indicated that upon learning of who the witnesses were, and their mental disabilities, he sought information from the Social Security Administration about the witnesses, but he was unable to get any information in time. He asked for the court to either adjourn the trial, or to order the prosecutor to call those witnesses last, so that counsel might have more time to get the

documents about the mental disabilities. This was denied. (T Aug 31, 5-6).

Defendant also complained that the defense lawyer was not prepared, and was just coming out from different trials. There were witnesses to be located that were not located. He stated "For me to come in here today with a defense that's not prepared to defend me properly is unfair to me." (T Aug 31, 12-13).

The Sixth Circuit ruling that "Clark had a great deal of time to prepare a defense" is unfair, because although there was a great deal of time to prepare a defense in general, the defense had notices of these witnesses only a couple of days before trial. Clark had hundreds of clients. He had no idea which ones the government was going to call against him until days before trial. That is the amount of time that should be in question, not the time that Defendant had before he knew which witnesses would be called.

It would be unreasonable to expect Defendant, in preparing for trial, to try to get records on hundreds of people, of whom only a small number would testify at trial. Where the prosecutor withheld the information needed to do the investigation until the last minute, that is the fault of the prosecution, not the defense. Further, the government seized Defendant's records, (T Sept 9, 19), making it impossible to use those records for research.

In *Ungar v. Sarafite*, 376 U.S. 575, 589; 84 S.Ct. 841; 11 L.Ed.2d 921 (1964), the U.S. Supreme Court

held" "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel a hollow formality."

A defendant has a constitutional right to have his counsel conduct an adequate investigation, which requires adequate time. See *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992).

In similar situations, the Sixth Circuit has found abuse of discretion from failing to grant adjournment of trial. See *United States v. Wirsing*, 719 F.2d 859 (6th Cir. 1983).

As for the request to get a new attorney, there are only two possibilities. Either attorney Mullkoff did have enough time to do the investigation, or he did not. If he did not have enough time, then the motion to adjourn should have been granted.

If, as ruled by Judge Edmunds and the Sixth Circuit, he did have enough time, (T Aug 31, 13-14), and that he should have issued his subpoenas long ago (T Sept 9, 91-92), then his failure to meet his responsibility to do the investigation in that time would be cause for a reasonable defendant to want the attorney replaced. A criminal defendant has a constitutional right to an attorney who will conduct appropriate and timely investigation. *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974).

The Court in *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985) held that "if on discovering justifiable dissatisfaction a court refuses to replace the

attorney, the defendant may then properly claim denial of his Sixth Amendment right."

Defendant said that counsel was not prepared to proceed. Counsel said that he was not prepared to proceed. The judge said that counsel had plenty of time in which to prepare. Therefore, since counsel was not prepared, good cause for substitution was shown. Regardless of the experience of attorney Mullkoff, if he was so busy that he did not have time to do adequate investigation, that was good cause to replace him.

This Court should grant Defendant a new trial, with new counsel that has adequate time and willingness to investigate.

QUESTION 7: WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION ON COUNTS 3 AND 4.

With respect to the Blue Cross Blue Shield patients, Dr. Lo did not testify that the services billed were not provided. Instead, what he testified to was that in the documents provided him by the Government, he did not find adequate documentation that the services were provided. (T Sept 9, 86, 87, 88, 90, 92, 94, 95, 97, 101). He frequently found some documentation, but he found it inadequate to meet the standards of BCBS. See, for example, T Sept 9, 84, 86, 87, 94, 97).

If it were a crime to submit a billing that was not backed by documentation sufficient to meet the requirements of BCBS, then there is enough

evidence to convict Defendant. However, that is not a crime, and it certainly was not charged. What was charged was fraud. So, the question is, where is the evidence that Defendant lied to BCBS about services performed? Where is the evidence that he did not perform the services that he billed for? Dr. Lo provided no such evidence, and neither did any other witness.

In the case of Counts 1 and 2 (regarding Medicaid), the prosecutor called witnesses to testify they had not received services that the W.G. Clark center had billed Medicaid for. However, not one of the BCBS billing clients testified at all, and none testified that they did not receive the services.

It is sheer speculation to say that because there was testimony that some billings to Medicaid were false, therefore all billings to all entities were false. Since it is the prosecution that has the burden of proving guilt beyond a reasonable doubt, *In Re Winship*, 397 U.S. 358; 90 S.Ct. 1068; 25 L.Ed.2d 363 (1970); *Jackson v. Virginia*, 443 U.S. 307; 99 S.Ct. 2781; 61 L.Ed.2d 560 (1979), the question is not whether Defendant had adequate documentation he was innocent. The question is whether the prosecution presented adequate documentation he was guilty. And here, they did not.

This Court should therefore reverse the convictions on Counts 3 and 4 for insufficient evidence. Upon doing so, this Court should remand for resentencing on any counts that remain unreversed. *United States v. Moore*, 540 F.2d 1088 (D.C. Cir. 1976).

QUESTION 8: WHETHER THE COURT IMPROPERLY SENTENCED DEFENDANT ON THE BASIS OF INCORRECTLY CALCULATED SENTENCING GUIDELINES.

Defendant complained that he should not have received 2 points for obstruction of justice (paragraphs 17 and 26 of presentence report), Sentencing Guidelines § 3C1.1. (Sent, 6-7). The judge listed as reasons that there was perjury at the trial, obstruction during the investigation, and failure to provide financial records.

Clearly, the failure to provide financial records does not qualify as obstruction of justice, according to Application Note 2 to § 3C1.1.

Not a single instance of obstruction of justice during the investigation was cited by the court or by the probation office. It does not suffice to simply assert that there was obstruction of justice; to count obstruction of justice, there must be some indication of a specific act of the Defendant at a specific time that qualifies. *United States v. Sassanelli*, 118 F.3d 495, 501 (6th Cir.1997).

As for perjury, the prosecutor put forth his theory as follows (Sent, 6-7; Apx. 211):

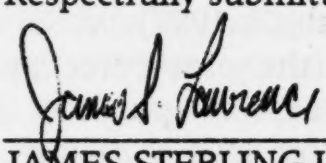
> "MR. SOISSON: Your Honor, Mr. Clark inappropriately tried to sway the jury into finding him not guilty, and I think that would be the classic definition of obstruction. His intent was to convince the jury that he wasn't guilty."

In other words, the prosecutor's position is that if a defendant testifies he is innocent, that is obstruction of justice. We submit that a defendant has the constitutional right to "convince the jury that he wasn't guilty" even when the prosecutor thinks he is guilty. That is what trials are for. The prosecution tries to persuade the jury that the defendant is guilty, and the defense tries to persuade the jury that the defendant is not guilty. It would be gross injustice to say that a defendant must give testimony that agrees with the prosecution theory, or else get a higher sentence.

CONCLUSION

Petitioner Kenneth H. Clark respectfully submits that for the reasons stated above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,



JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Clark
717 Penobscot Building
Detroit, MI 48226
(313) 965-4189

Dated: March 7, 2002

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 00-1743

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

FILED
DEC 14 2001

v.

KENNETH H. CLARK, SR.,
Defendant-Appellant.

Before BOGGS and GILMAN, Circuit Judges; and QUIST, District Judge. [FN*]

PER CURIAM. Clark appeals his conviction on two counts of mail fraud, in violation of 18 U.S.C. § 1341, and two counts of health care fraud, in violation of 18 U.S.C. § 1347. Clark, operating as W.G. Clark Counseling Center, is alleged to have fraudulently billed Medicare and Blue Cross/Blue Shield of Michigan ("BCBS") for substance abuse counseling he did not perform.

On appeal, Clark makes six arguments: (1) that the district court erred in permitting inadmissible prior bad acts evidence; (2) that the court erred in permitting additional prejudicial evidence; (3) that the prosecutor knowingly misled the jury with a false statement in his closing argument; (4) that the court erred in denying Clark an adjournment at

FN* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

the start of his trial and denying him permission to fire his attorney; (5) that there was insufficient evidence to convict Clark on the two charges related to BCBS; and (6) that the court erred in sentencing Clark by increasing his base offense level for obstruction of justice. For the reasons set forth below, we affirm Clark's convictions and sentence.

I

Clark, a former Detroit police officer, incorporated and operated W.G. Clark Counseling Center, which held itself out as providing substance abuse counseling. The Center registered with Medicare and with BCBS, submitting documentation stating that two medical doctors, Carl Fowler and James Beale, and a psychiatric social worker, Valerie Sanford, would be providing the services. All three of these individuals have since testified that they did not work with the Center, that their information was used fraudulently, and that their signatures on the registration documents were forged.

In 1996 and 1997, Clark submitted to Medicare and BCBS bills totaling in excess of three hundred thousand dollars. With regard to the Medicare submissions, the government presented the testimony of Medicare recipients for whom bills for treatment were submitted. Each of the recipients testified either that they had never been treated at the Center or that they were treated fewer times than indicated on the submitted bills. With regard to the BCBS submissions, Clark submitted bills for services provided by physicians who evidence showed had not provided the claimed services.

Clark's principal defense was that, since he did not

understand the billing procedures of the two insurers, he relied on a man named Ron Hawkins to do his billing. Hawkins worked at Lifeline, a Chicago-based substance treatment center, and Clark alleged that Hawkins combined Clark's billing with his own. According to Clark's defense, Hawkins would submit both sets of bills under Clark's business name; Clark would then deposit the insurers' checks and pay to Hawkins in cash the portion of each check that Hawkins would tell Clark represented Hawkins's billings.

Clark's trial was initially scheduled to begin on January 26, 1999. Clark requested and received two adjournments, and then discharged his retained lawyer and requested court-appointed counsel. Clark then requested, and was denied, another adjournment, and trial began on August 31, 1999. On the first day of trial, Clark moved to discharge his court-appointed attorney, and the court denied his motion. Clark was convicted on all four counts and was sentenced to concurrent terms of 30 months of imprisonment on each count, to be followed by three years of supervised release; he was also ordered to pay $324,413.55 in restitution.

Clark now appeals various rulings and actions of the district court and the prosecutor during and after his trial. Clark argues that in two separate instances the court impermissibly permitted the introduction of prejudicial evidence, that the prosecutor committed misconduct by knowingly misleading the jury in his closing argument, that the court erred in denying his last-minute motion for an adjournment or alternatively his motion for new counsel, that there was insufficient evidence to support one of his convictions, and that the court erred in sentencing him.

II

A 4

The Prosecution's Cross-Examination of Clark with Regard to his Polygraph Business

In his trial testimony, Clark testified at length regarding his 13-year career as a Detroit police officer, discussing the specialized training he had received as an officer, the units he had worked in, and how he had used his police training to begin operating a polygraph business on the side while still an officer. The prosecution then cross-examined Clark about his polygraph business, asking whether the Chief of Police had ordered him at one point to stop conducting criminal polygraphs as part of his business. Clark initially answered, "[n]ot exactly," but when presented with a transcript of his police disciplinary hearing for his actions, Clark admitted to being ordered to cease conducting criminal polygraphs but having continued to do so in violation of the order.

Defense counsel objected to this cross-examination at trial, but the court allowed it under Federal Rule of Evidence 404(a)(1) (allowing an exception to the general rule that character evidence is inadmissible in cases where "[e]vidence of a pertinent trait of character [is] offered by an accused, or by the prosecution to rebut the same"). Clark now argues that his ruling was incorrect and that the admission of this testimony prejudiced him.

The government argues that the subject of Clark's polygraph business was proper under the Federal Rules of Evidence because Clark had already put his character at issue through his testimony and that of one of his witnesses. First, the government argues that by testifying about his experience, training, and various positions as a police officer and how he used his police training to start the polygraph business while still an officer, Clark opened the door for

questions about his record as a police officer and the legitimacy of his polygraph business. Additionally, prior to his testimony, Clark called FBI Special Agent David Hervey to testify that Clark had once reported possible corruption in city contracts and had assisted in the investigation of this report by wearing a recording device to a meeting with a city official. In response to a prosecution objection on relevancy grounds, defense counsel stated that the testimony was to elicit character evidence showing Clark's honesty (apparently to draw an inference that the FBI trusted Clark's honesty enough to use him in an investigation). The government contends that, having put his own honesty at issue, the Federal Rules allow "the prosecution to rebut the same." Fed. R. Evid. 404(a)(1).

Under Rule 404(a)(1), "evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same" is admissible. Fed. R. Evid. 404(a)(1). It is well-settled that "[o]nce the defendant has 'opened the door' by offering evidence as to his good character, the prosecution may rebut that evidence." *United States v. McGuire,* 744 F.2d 1197, 1204 (6th Cir.1984). As the Supreme Court has written of a defendant who presents good character evidence by opinion testimony, "[t]he price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson v. United States,* 335 U.S. 469, 479, 69 S.Ct. 213, 93 L.Ed. 168 (1948). So, "while the law gives [the] defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by

a mere parade of partisans." *Id.* Though he asserts otherwise in his brief to this court, Clark clearly put his character at issue through both Agent Hervey's and his own testimony. The question, then, is whether eliciting information about the police disciplinary action fairly rebuts Clark's evidence.

Clark called Agent Hervey expressly to serve as a character witness to show Clark's character for honesty. Therefore, as discussed above, the prosecution was permitted to rebut that evidence either by calling additional witnesses or by cross-examination. In its brief to this court, the government claims that the cross-examination of Clark, eliciting testimony about the police disciplinary proceedings and Clark's actions regarding his polygraph business, was permissible as a rebuttal of Clark's evidence of his honesty.

It is not entirely clear that this is correct. It is undisputed that the government's rebuttal evidence must speak to the character trait set out by the defendant. *See* Fed. R. Evid. 404(a)(1) (allowing "the prosecution to rebut the same"). It may be that Clark having run a polygraph business performing criminal polygraphs in contravention of police rules and of an express order by the Chief of Police speaks to his honesty. However, the government did not point out in the cross-examination the relevance of this testimony to Clark's honesty; the testimony elicited showed only that Clark was ordered not to run the business as he did and that he continued despite the order.

However, a review of the record does not make it entirely clear that the trial court permitted the polygraph cross-examination to rebut Clark's evidence of his character for honesty. Though also referencing Agent Hervey's honesty testimony, the court said of the objected-to polygraph questioning, "[t]his goes directly to his direct testimony. It

goes to his character and I'm going to permit it." If viewed as general character evidence introduced to rebut Clark's extensive testimony about his police career and the polygraph business which grew out of his specialized police training, the cross-examination was permissible in that it spoke directly to the general good character evidence set out by the defendant.

On the topic of character evidence, this court has written:

> It is well settled law that in a criminal case the defendant's general character cannot be attacked by the Government unless evidence as to his good character is first introduced by the defendant. Accordingly, if the defendant calls character witnesses who testify to his good character in general, the Government can meet this evidence by the introduction of witnesses who contradict such testimony.
>
> *United States v. Walker*, 313 F.2d 236, 238 (6th Cir.1963).

Since this rule certainly applies to character evidence offered by the defendant himself, in addition to that introduced by defense witnesses, the government can act to contradict general character evidence offered by a defendant. Further, though Clark claims that he did not introduce character evidence through his testimony about his police career, it is clear from a review of the record that this was its effect. Therefore, the prosecution's cross-examination on the facts surrounding the polygraph business that Clark had already testified to as part of his police career testimony

properly rebutted the general character evidence implicit in Clark's testimony. This is proper because, "once a defendant has raised a particular subject in his or her testimony, ... defendant has opened the door, and testimony of both a general and specific nature may be elicited to provide a complete picture of the subject raised by the defendant." 2 Jack B. Weinstein & Margaret B. Berger, *Weinstein's Federal Evidence* § 404.11[2][b] (2d ed. 2001).

Finally, even if we were to find that the district court abused its discretion in allowing the polygraph cross-examination, this court has held that errors with respect to the admission of evidence are subject to harmless error analysis. *See United States v. Daniel,* 134 F.3d 1259, 1262 (6th Cir.1998). Further, it is well settled that an error not of constitutional dimension is harmless "unless it is more probable than not that the error materially affected the verdict." *United States v. Fountain,* 2 F.3d 656, 668 (6th Cir.1993); *United States v. Martin,* 897 F.2d 1368, 1372 (6th Cir.1990) ("Where an error is not of constitutional dimension, it is harmless unless it is more probable than not that the error materially affected the verdict."). A review of the record makes it clear that the challenged line of questioning could not have been significantly prejudicial to Clark, as it was not dwelt on, emphasized, or otherwise relied on by the prosecution. As such, it is impossible to say that it more likely than not affected the verdict.

The Prosecution's Cross-Examination of Clark with Regard to Cash Receipts Clark Kept for Restaurant Meals

During cross-examination, the prosecution asked Clark about receipts he kept for business meals at the Excalibur, a

restaurant that Clark claims in his brief is "a fancy, expensive restaurant." Defense counsel objected to the questioning at trial on relevancy grounds, but was overruled. On appeal, Clark claims that the line of questioning violated his due process rights because it was not relevant, was more prejudicial than probative, and was improper character testimony. This argument is without merit.

In support of his argument, Clark quotes a portion of the trial transcript in which the government, having entered into evidence books of business receipts kept by Clark, asks Clark about a receipt for a one hundred and six dollar meal at the Excalibur. Clark claims that this line of questioning was irrelevant and used only as character evidence, intending to engender animus against him on the part of the jury by showing him to have led an extravagant lifestyle.

Clark fails to mention in his argument the context in which the government asked about the receipt. Clark's defense to the charge that he defrauded Medicare and BCBS was that he relied on Ron Hawkins to submit his billings and that he paid the portion of each incoming check that represented Hawkins's billings to Hawkins. Clark claimed to have paid Hawkins, in cash, whatever amounts Hawkins claimed as belonging to him, without keeping any record of the payments. The government, by submitting into evidence Clark's business receipt books and questioning Clark about the receipts he kept for one hundred dollar meals, sought to use Clark's practice of keeping careful business records as evidence to impeach Clark's claim that he had paid out hundreds of thousands of dollars to Hawkins in cash without keeping records of the payments. With this context in mind, it is clear that the prosecution's reference to the carefully-kept restaurant receipt was relevant and had nothing to do

with character evidence. It is therefore clear that Clark's argument on this score must be rejected.

Alleged Prosecutorial Misconduct in the Closing Argument

In his closing argument to the jury, the prosecutor, referring to the large cash payments Clark claimed to have made to Hawkins out of his business account, said, "[a]nd if you look at the bank records or whatever accounts you want to look at, you're not going to see large cash withdrawals to make these payments." Clark claims that the prosecutor knew this statement to be false, and intentionally used it to mislead the jury into improperly convicting him. This argument, too, is without merit.

To support his claim, Clark points to an exchange before the grand jury between the same prosecutor and an FBI agent who had investigated Clark's business. In the exchange, the prosecutor asked the agent whether the Center's bank statements showed many "significantly large cash withdrawals," and the agent replied that it did. According to Clark's argument, since the prosecutor was involved in this exchange, he knew the statement he made in his closing argument to be false and misleading.

In support of his argument, Clark cites case law for the proposition that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States,* 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Though an accurate statement of the law, Clark does not prove any "deliberate deception" on the part of the prosecutor. To the contrary, when one looks at the context, it becomes clear that there was no deliberate deception. First,

all of the records to which the prosecutor referred were in evidence in the case, and therefore were available to the jury to check for themselves (which is precisely what the prosecutor asked the jury to do in the challenged statement). In addition, the phrases in question "large cash withdrawals" and "significantly large cash withdrawals" are open to individual interpretation and what one person considers large or significant another may not. It is therefore clear that the prosecutor did not commit misconduct by deliberately misleading the jury.

The Trial Court's Denial of Clark's Last Motion for a Continuance and Clark's Second Motion to Replace his Counsel

In his fourth argument, Clark contends that the district court abused its discretion in not granting Clark his final continuance or his final request for the appointment of new counsel. In support of this argument, Clark points out that the government did not provide defense counsel with a witness list until August 26, just days before Clark's August 31 trial. As a result, Clark claims that his counsel did not have time to explore the background of witnesses that Clark believed to have mental disabilities.

In order for this court to find reversible error in a trial court's decision not to grant a continuance, Clark must show "actual prejudice" resulting from the denial. This requires a "showing that a continuance would have made relevant witnesses available or added something to the defense." *United States v. King,* 127 F.3d 483, 487 (6th Cir.1997), *cert. denied,* 522 U.S. 1130, 118 S.Ct. 1082, 140 L.Ed.2d 139 (1998); *accord United States v. Crossley,* 224 F.3d 847, 855

(6th Cir.2000). Clark does not allege that new witnesses would have become available, and he does not sufficiently show how the denied continuance would have added something to his defense.

First, from a practical perspective, Clark had a great deal of time to prepare a defense, having been granted several continuances and one change of attorney. Clark was arraigned in November 1998, with a trial date initially set for January 26, 1999. The trial was reset for March 2, 1999, and then Clark was granted his first continuance, putting the date off until May 4, 1999. On April 28, Clark requested and was appointed new counsel, and the court date was put off again. Then, on June 17, 1999, the case was adjourned at Clark's request until August 31, 1999. It was on this date that the trial court denied Clark's motions seeking first a continuance and then, alternatively, new counsel. Clark cites case law for the proposition that, while normally continuances are within the discretion of trial courts to grant or deny, this discretion is abused if a court shows "a myopic insistence upon expeditiousness in the face of a justifiable request for delay." *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). Based on the repeated delays granted to Clark, it is clear that this case does not illustrate such an insistence.

Clark alleges, however, that the problem was not the total time he had to mount a defense, but the time between the prosecution turning over its witness list and the beginning of trial. Clark admitted in arguing the motion before the trial court that the prosecution's timing was permissible under local court rules. However, in his Rule 29 motion making the same argument, Clark's attorney claimed that a lapse of ten days between the defense requesting the list and the

prosecution turning it over prejudiced the defense because it left insufficient time to check the mental health background of the witnesses.

It is difficult to see how this argument has merit. First, as the trial judge pointed out when hearing the motion, the nature of the charges against Clark was such that the witnesses would necessarily be current or former drug addicts. As such, it should hardly have been surprising to Clark that the witnesses at his trial would have mental health (specifically substance abuse) problems. Indeed, if Clark had been treating these witnesses as his billings reflected, he would have extensive knowledge (and records) about their backgrounds. Further, defense counsel had ample opportunity to--and repeatedly did--cross examine the witnesses on their substance abuse and mental health conditions. It is therefore difficult to see how Clark was prejudiced in this respect.

Finally and most importantly, Clark's defense did not rely on the impeachment of the witnesses in question. Each of the witnesses at issue testified that they had been to the Center, if at all, fewer times than submitted for billing to the insurers. Clark's defense did not rely on proving these witnesses wrong; instead of arguing that fraud did not occur with respect to these witnesses, Clark's defense was that it was not he that committed the fraud that occurred. As such, Clark did not need to impeach these witnesses with the mental health backgrounds he should already have known about, and he therefore cannot show prejudice in not having more time to research those backgrounds.

Because Clark had no sufficient basis for requesting a continuance on the day of trial, he also had no basis for his alternative motion for appointment of new counsel, which

relied on the same argument. As such, it is impossible to find that the trial court erred in denying this motion as well.

Clark's Challenge to the Sufficiency of the Evidence Supporting the BCBS Convictions

Whereas the government relied on the testimony of purported patients in showing that Clark had defrauded Medicare, it called no such witnesses in making its case regarding BCBS. In Clark's fifth argument to this court, he claims that, because of this, the government failed to prove that the billings with respect to BCBS were false, and therefore, there was insufficient evidence to support his conviction on the BCBS counts.

At the outset, it should be noted that, while Clark made a Rule 29 motion for judgment of acquittal at the close of the government's case, he failed to renew that motion at the close of all of the evidence. This court has held that "[t]o protect the issue of sufficiency of the evidence a defendant must move for a judgment of acquittal under Rule 29 both at the close of the government's case and at the close of all of the evidence." *United States v. Dandy,* 998 F.2d 1344, 1356 (6th Cir.1993), *cert. denied,* 510 U.S. 1163, 114 S.Ct. 1188, 127 L.Ed.2d 538 (1994). Having not done so, Clark is entitled to reversal on appeal only in the case of a "manifest miscarriage of justice." *United States v. Williams,* 940 F.2d 176, 180 (6th Cir.1991). This has been interpreted to require that the record be "devoid of evidence pointing to guilt." *United States v. Price,* 134 F.3d 340, 350 (6th Cir.1998) (quoting *United States v. Robles-Pantoja,* 887 F.2d 1250, 1254 (5th Cir.1989)).

While it is true that the government did not present

direct, testimonial evidence of supposed patients to show that the services billed were never provided, it is certainly not the case that no evidence was presented to support the contention that the billings were fraudulent. The government presented testimony by the doctors and others to the effect that all of the signatures of medical providers on the Center's registration statement were forgeries. Having established by testimony that all of the doctors allegedly affiliated with the Center were not so affiliated, the government's evidence showing that most of the billings in question were for services performed by doctors provides evidence of fraud. Additionally, the government presented the testimony of clerical workers in the Center, each of whom stated that the Center saw almost no patients. The government also put into evidence that, upon searching the Center, authorities found only one filing cabinet with patient records. A BCBS doctor who reviewed these files testified that the records did not support the billings that were submitted for the patients represented by the files.

Though it could be said that the government's case against Clark on the BCBS counts would have been strengthened by the direct testimony of supposed patients, it is impossible to say that there was insufficient--let alone no--evidence to support the conviction.

The Trial Court's Increase of Clark's Base Offense Level for Obstruction of Justice

Paragraph 17 of the Presentence Report prepared in Clark's case recommends an adjustment for obstruction of justice based on several actions by Clark. Among other assertions, the paragraph states: "The defendant impeded or

obstructed justice or attempted to impede or obstruct justice, in that he perjured himself during his trial and provided false statements during the investigation of this case." During the sentencing hearing, the trial judge specifically stated that Clark had committed perjury, at the very least, in his testimony regarding the genuineness of the three signatures on the Center's registration forms filed with the insurers. As the judge pointed out, there was evidence that each of the signatures was forged. The judge then went on to affirm, in response to a question by defense counsel, his finding that the obstruction adjustment followed from this finding of perjury.

Under the United States Sentencing Guidelines, a trial court is obligated to increase a defendant's offense level by two levels if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." *See* USSG § 3C1.1. Further, the commentary to the Guidelines lists "committing, suborning, or attempting to suborn perjury" as an example of the type of conduct intended to warrant the adjustment. USSG § 3C1.1, comment. (n.4(b)).

Clark argues that the judge erred in applying the adjustment for obstruction of justice; however, his argument is frivolous. In his brief to this court, Clark attempts to disprove each of the listed potential bases for the obstruction adjustment. However, the only basis the judge discussed was Clark's perjury, and--as USSG § 3C1.1, comment. (n.4(b)) reads--this was enough for a finding that the adjustment applied.

On the perjury issue, Clark cites cases for the proposition that merely denying guilt is insufficient for an

obstruction adjustment based on perjury. *See United States v. Dover,* No. 97-2044, 1999 WL 1204794 (6th Cir. Dec. 7, 1999); *United States v. Johns,* 27 F.3d 31, 35 (2d Cir.1994). It is true that merely denying guilt is not sufficient for the obstruction adjustment. However, as the commentary to the Guidelines points out, the "denial of guilt under oath ... constitutes perjury," which of course is intended to lead to an obstruction adjustment. USSG § 3C1.1, comment. (n.2). As the Supreme Court has held, "[a] witness testifying under oath or affirmation [commits perjury] if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *See United States v. Dunnigan,* 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993). Clark's testimony was made up of more than just general denials or statements resulting from some mistake; he testified under oath to specific material untruths, which constitutes perjury.

Clark also argues that the court failed to find specific instances of perjury justifying the adjustment. He is correct on the law, as this circuit has stated that "in the usual case the sentencing court must identify particular examples of the defendant's untruthful testimony upon which it bases the ß 3C1.1 enhancement." *See United States v. Sassanelli,* 118 F.3d 495, 501 (6th Cir.1997). However, the trial court did explicitly find that Clark had committed perjury and listed as an example his testimony regarding the signatures on the Center's registration documents. The judge seemed to suggest that there were other bases for a finding of perjury, but at the least the judge specifically pointed out the testimony regarding the registration signatures.

III

Having found that all of Clark's arguments to this court lack merit, Clark's convictions and sentence are hereby AFFIRMED.